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MICHAEL ROD
J., JR.,

IN THE

Supreme Court of the United States

No. 71-1648

RICHARD A. NAPOLITANO,
Petitioner,

vs.

DANIEL P. WARD, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

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December 29, 1972.

THE DUNHOOP-WARREN PRINTING COMPANY, CHICAGO

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Now comes the petitioner and respectfully moves for an order: (1) vacating the denial of the petition for certiorari entered on December 4, 1971; (2) granting certiorari; or (3) issuing a rule to show cause why certiorari should not be granted and directing briefs and oral argument thereon.[1]

The petition for writ of certiorari was filed on June 19, 1972 and on September 19, 1972 the Clerk addressed a letter to the Attorney General of Illinois stating, *inter alia:*

1. See e.g.: *United States* v. *Thomas,* 361 U. S. 950, 951; *Aaron* v. *Cooper,* 358 U. S. 27-28; *Adkins* v. *DuPont Co.,* 335 U. S. 331; *In re Yamaskita,* 327 U. S. 1.

> The Court has directed this office to request that a response be filed in this case. Forty printed copies of the response, together with proof of service thereof, should reach this office on or before October 19, 1972.

Messrs. Stern & Gressman, SUPREME COURT PRACTICE (4th ed., 1969) at page 317, state:

> If no opposing brief or waiver thereof is filed by the respondent the Court ordinarily will take action on the basis of the petition alone shortly after expiration of the time for filing such a response. But in exceptional situations, the Court may request a response to the petition even though the time for filing has elapsed and will defer action on the case until the respondent has made known his views. Such a request may also be made where the situation is not particularly exceptional but where the Court may deem it appropriate to hear from the respondent before acting upon a petition that is *prima facie* meritorious.

Rule 24(1), Rules of the Supreme Court of the United States prescribes that the response should disclose "any matter or ground why the cause should not be reviewed by this Court"; and Stern & Gressman [Id., p. 315] say that it should "point out that the presence of other meritorious arguments . . . shows that the decision below is correct without regard for the question sought to be raised by the petition and that as a result the Supreme Court would be likely not to reach the point of alleged importance or conflict."

Respondents' Brief in Opposition is not a response to the petition for writ of certiorari. They do not deny the statement of the case—they ignore it. They simply exploit the overbroad ambiguities of the opinion below and pervasively misrepresent the "conduct for which appellant (petitioner) was removed from office" as "established by the Courts Commission from the use of his testimony before a Grand Jury compelled by a grant of full transactional immunity." [457 F. 2d 279, 280 (Pet. App. 4-5.)]

The thing we most cannot understand is the extremes to which so many have gone to deny the petitioner fair and disinterested adjudication. During the course of such "adjudicatory" hearings as we have had, everyone has quite candidly conceded that the claim of constitutional privilege was the conduct constituting the appearance of impropriety and cause for removal. Yet, the ensuing opinions seem to go far too far to hide that fact.[2] Our question is why?— A question which in and of itself may require this Court's attention far more than the many others.

The petition for writ of certiorari states the case as "established by the Courts Commission" [Pet. App., 4-5. Also, Pet. for Cert., 4-8]. It concretely presents the questions whether: (1) a judge enjoys the benefits under the constitutional command that "no person shall . . . be compelled in any criminal case to be a witness against himself" and; (2) a criminal penalty, as defined by the surrounding incriminating circumstances, may be inflicted for mere appearance of criminality—particularly when the record proves that self-incrimination and indictment would have been adjudicated in favor of petitioner's acquittal. [*Questions Presented;* Pet. For Cert., 2 and 3.].

Respondents' brief in opposition misstates the case as if the appearance of criminality had, in fact, been established as criminal impropriety. At pages 3, 13-14 of the brief in opposition respondents make unwarranted, unfair and defamatory characterizations with reference to the transcript of petitioner's grand jury testimony.[3]

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2. During oral argument in the Court of Appeals Circuit Judge Stevens flushed the admission from the Attorney General that a judge "taking the Fifth" violates the Appearance of Impropriety Clause. The colloquy was vividly fixed in mind when Senior Judge Duffy asked the Attorney General whether he would be subject to disciplinary removal if he wore a red sock and a green sock. The opinion indicates that the shadow and not the substance—the label and not the thing is what is involved.

3 We honestly don't know what offense is implied by the innuendo. Some 19 or 20 witnesses appeared before the grand jury. Petitioners' testimony is isolated to its own context in the tran-

Without analytical finding or critical definition the Seventh Circuit declared its own "principal issue" and decided that "the conduct for which appellant (petitioner) was removed from office may be established by the Courts Com-

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script. Though the transcript was not considered as proof of its content respondents clearly misrepresent this fact. If it were, the ultimate fact-finder would have been the grand jury and not the Courts Commission. The indictments failed to state the crime charged. Thus, if the content of petitioner's testimony is to be considered at all, then the following colloquy at the conclusion thereof is all that is relevant (Ptf. Ex. 4, Tr., pp. 79 and 81):

FOREMAN: Could you explain to the Grand Jury why you've taken immunity, you being a judge, during this investigation? Could you explain that to us?

THE WITNESS: Certainly. On the advice of my attorney, Mr. Foreman.

FOREMAN: Could you tell us what that advice was, the reason for it?

THE WITNESS: He just advised me to exercise my right and privilege under the Fifth Amendment.

FOREMAN: You don't have—

THE WITNESS: And I abide by my attorney's advice.

FOREMAN: You don't have nothing to hide or anything?

THE WITNESS: I've told you everything that there is.

FOREMAN: Well, why would you have to tell that under immunity?

• • • • •

THE WITNESS: Mr. Foreman, the layman's picture of a person exercising his right and privilege under the Fifth Amendment is very often misconstrued. And I say this without being critical. I think you are a fair-minded person. But the first inclination of someone exercising his rights is that he's hiding or he's guilty of a wrongdoing.

FOREMAN: Well, that's mine.

THE WITNESS: And that is a misconception, and I think the State's Attorney would verify that statement, and I think it's an accurate statement. It's a privilege and it's a guarantee by the Constitution. It does not in any way infer that a man who exercises his right is guilty.

FOREMAN: Thank you, sir.

MR. HOLLIS (State's Attorney): Any other questions?

That was on January 29, 1970! Only this Court can now revitalize the Constitutional faith and conviction then demonstrated by the Witness.

mission from the use of his testimony before a grand jury compelled by a grant of full transactional immunity." [Pet. App., 4-5.]

The parties have stipulated that the evidence and the ultimate facts are not in dispute. [Motion under *Rule 30(f), Federal Rules of Appellate Procedure* (7th Cir.).] The record is neither opaque nor factually contradictory. Opaqueness, confusion and contradiction have been generated by the respondents' under the guise of the overbroad language of the opinion below.

It seems that judicial ambiguity and adversary misstatement have defeated the aim of this Court when it requested "that a response be filed in this case". [*Ante*, pp. 1-2.]

I.

WHEN THE SUPREME COURT OF THE UNITED STATES REQUESTS A RESPONSE TO THE PETITION FOR CERTIORARI AND OVERBROAD LANGUAGE IN THE OPINION BELOW PERMITS MATERIAL MISREPRESENTATION OF THE CASE PRESENTED THIS COURT SHOULD VACATE ITS DENIAL OF CERTIORARI, GRANT THE WRIT OR DEFER ACTION THEREON UNTIL AFTER PLENARY CONSIDERATION.

This Court has often dismissed writs of certiorari as improvidently granted because briefing and oral argument forced out matters not fully apprehended when certiorari was granted. The corollary of this proposition applies here. Cases, like individuals, fall within the phrase "*Esse Non Videre*".[4] And this case should be tried for what it is and not for what respondents and the courts below have made it seem to be.

The findings of the Courts Commission [*infra*, pp. 10-11] which when read together with the disciplinary complaint

4. Loosely conjugated and translated to mean—I am what I am —not what I seem.

[*infra*, 7-8] and the limited use of the documentary evidence [*infra*, pp. 9-10] clearly establish that the petitioner was removed from office because Illinois' response to the federal privilege prohibited his criminal prosecution [Ill. Rev. Stat. Chap. 38, § 106-1 et seq.] and thus; because he would have been indicted had he not claimed the constitutional right.

It is fundamental that "A decree must relate specifically and exclusively to the pleadings and proof. If not so related, the provision because of its vagueness, will jeopardize the exercise of protected freedoms." [*United Transportation Union* v. *State Bar of Michigan*, 401 U. S. 576, 581.] Moreover, the petitioner had a right, under 28 USC § 1343 and 42 USC § 1983, to have his Federal Constitutional claims heard and determined on the basis of what was, in fact," "established by the Courts Commission" [Pet. App., 4-5]. And under federal, no less than state, adjudication procedures must be used which do not hide the arbitrary infliction of punishment [Cf. *Cole* v. *Arkansas*, 333 U. S. 196; *Goldberg* v. *Kelly*, 397 U. S. 254. See also: *SEC* v. *Chenery Corp.*, 318 U. S. 80].

We are aware of and sensitive to the strict limitation of Rule 58(2), *Rules of the Supreme Court of the United States*. But abstract principle must sometimes flex to concrete cases. Under present circumstances substantial justice depends on clarification of the case. [See *e.g.*: *Hickman* v. *Taylor*, 327 U. S. 808; 328 U. S. 876; 329 U. S. 495. See also, Stern & Gressman, SUPREME COURT PRACTICE, § 15.7, p. 526 (4th ed. 1969).]

The misleading impact of the overbroad language below and the false-face of the facts mispresented by the brief in opposition are evident from the following:

Facts Presented by Appellant's Brief—7th Circuit

(Pages 14-18)[5]

I.

The disciplinary complaint alleged:

"1. That on or about September 1, 1969, the Sangamon County Grand Jury commenced an inquiry into possible wrongdoing in connection with the Illinois State Fair, which inquiry eventuated on January 30, 1970, in the filing of indictments numbers 317-70 and 320-70 alleging official misconduct in connection with the 1968 and 1969 State Fairs. These indictments allege the participation of respondent in said misconduct, though respondent is not named as a defendant therein.

2. That on or about January 29, 1970, the respondent appeared as a witness before the September Grand Jury, Sangamon County, Illinois, and in response to inquiries directed to him before said jury, the respondent invoked his constitutional privilege against self-incrimination in support of his refusal to answer questions concerning

7th Circuit Opinion Findings

(Petition Appendix, 3)

I.

"At the direction of the Supreme Court of Illinois, appellant was relieved of all assignments on February 5, 1970. On February 13, 1970, the Illinois Courts Commission designated the Attorney General of Illinois to prepare and file a complaint against the appellant. This was done on March 19, 1970, charging him with impropriety and the appearance of impropriety in violation of the Canon of Judicial Ethics."

5. The pleadings and judicial findings are taken verbatim from Appellant's Brief below.

the Illinois State Fair, and any possible wrongdoing on his part in connection therewith.

3. That respondent, accompanied by and speaking through counsel, appeared before the Honorable William H. Chamberlain, Judge of the Circuit Court of Sangamon County, on January 29, 1970, and in open court stated that he had invoked his constitutional privilege against self-incrimination in connection with the Grand Jury inquiry into the Illinois State Fair and his possible wrongdoing in connection therewith. Upon motion of the State's Attorney of Sangamon County, Richard A. Hollis, and without objection, respondent was granted immunity by the court in accord with the provisions of Article 106, Chapter 38, Illinois Revised Statutes, and *on information and belief, testified at length before the said Grand Jury thereafter.*" [Emphasis added][6]

II.

On June 12, 1970 the Circuit Court of Sangamon County dismissed the indict-

II.

No comment in opinion below.

6. The Attorney General signed the complaint. The "information and belief" allegation shows that the transcript of petitioner's testimony was not relevant to the initiation of disciplinary action and that its specific factual conduct is not embraced within the charges filed.

ments charging the petitioner as a non-indicted conspirator holding them defective in that "they do not constitute sufficient averments of facts." It further declared:

> The official misconduct Statute is not sufficiently specific so that a valid indictment for the offense of conspiracy can be drafted in the language of the Statute defining official misconduct, *People* v. *Isaacs*, 37 Ill. 2d 205."

III.

Beginning on July 7, 1970 a formal hearing was held before the Courts Commission. The following documentary evidence was admitted for limited consideration under the "Verbal Act" exception to the hearsay rule. The documentary evidence consisted of:

1. The 1/29/1970 report of proceedings before the Circuit Court of Sangamon County wherein petitioner was granted transactional immunity.

2. Indictments 317-70 and 320-70 (referred to in paragraph 1 of the foregoing disciplinary complaint)

III.

Beginning July 7, 1970, a formal hearing was had before the Illinois Courts Commission on these charges. Appellant was present and was represented by counsel. *Documentary evidence, including the transcript of appellant's testimony before the Grand Jury, was considered.* [emphasis added.]

which had been dismissed per II, *supra*.[7]

3. The transcript of appellant's testimony before the Grand Jury.

IV.

On July 14, 1970 the Courts Commission filed its judgment forfeiting petitioner's eligibility for his office and found thusly:

> "That the evidence in this case is clear and convincing that the conduct of Judge Richard A. Napolitano concerning certain concession contracts with The Illinois State Fair Agency while a member of the judiciary and the circumstances surrounding his testifying and the content of his testimony before the Sangamon County Grand Jury while a member of the judiciary, constitutes conduct unbecoming a Judge in that it violates

IV.

"On July 14, 1970, the Courts Commission found the evidence to be clear and convincing that appellant's conduct ". . . violates applicable Canons of Judicial Ethics including Canon 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office."

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7. The Attorney General stated: "They are being offered because they are part of the historical progression of a transaction whereby Judge Napolitano was granted immunity, did testify before a Grand Jury and as a result of that testimony these indictments were returned naming him. They are part of the general series of events which led to our appearance before the Commission." [Disciplinary Hearing, 7/7/70, Tr. 34]

The Courts Commission ruled that they "are not admissible as evidence against the Respondent (petitioner). They do pertain to the factual recital of the complaint. It seems that their admission is proper." [Id, 7/7/70, Tr. 36]

applicable canons of judicial ethics including canon No. 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office.'"[8]

II.

THE OPINION BELOW SO FAR DEPARTS FROM ACCEPTED AND CASUAL JUDICIAL PROCEDURE AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Seventh Circuit has decided that the conduct for which appellant (petitioner) was removed from office may be established by the Courts Commission from the case of his testimony before a Grand Jury compelled by a grant of full transactional immunity. [Pet. App. 4-5.] The critical factors are:

1. "The conduct . . . established by the Courts Commission", and

2. "The use of his testimony . . . compelled by a grant of full transactional immunity."

Its reasoning is summed up as follows:

Immediately after his testimony, various State Fair officials were indicted for their activities concerning State Fair Commission contracts.[9] Appellant (peti-

8. The Commission Order is reproduced as Appendix A hereto.

9. The Courts Commission found, when modified by the disciplinary complaint, that petitioner's conduct [claim of the privilege against self-incrimination] concerning certain concession contract . . . [*ante*]. The court of appeals subtly shifts the meaning—"State Fair Officials were indicted . . ."

tioner) was named as an unindicted co-conspirator resulting from his dealings with State Fair Commission contracts but he never was or has been subjected to criminal prosecution for any transaction, matter or thing arising from the immunized testimony. [Pet. App. 6-7.]

A cursory differential diagnosis of the facts before the Seventh Circuit and those as stated, in its opinion demonstrates the judicial sleight-of-hand used here.

As "established by the Courts Commission", the petitioner was removed from office because he refused to waive his right against self-incrimination and the circumstances surrounding it. In short, his conduct constituting the appearance of impropriety was established because his compelled testimony established that he could not be "subjected to criminal prosecution for 'any transaction, matter or thing' arising from his immunized testimony." [*Ante*]

The destructive impact of judges judging judges under standards, which, like beauty, lies in the eye of the beholder, is suicidal. It transposes judicial duty from the verb to the noun. It is far more pervasive and prejudicial to the punitive object than was the inherent lack of "procedural safeguard" of the "Mayor's Court" in *Ward* v. *Village of Monroeville*, ____ U. S. ____, 41 U. S. L. W. 4011 (decided 11/13/72).

III.

JUDICIAL SELF-INTEREST AND CONCENTRATION OF DISCIPLINARY POWER MANDATES AUTHORITATIVE REMOVAL OF STANDARDS SUCH AS: APPEARANCE OF IMPROPRIETY, PERSONAL BEHAVIOR ABOVE REPROACH, AND TENURE DURING GOOD BEHAVIOR.

Institutional self-interest in the integrity and confidence in the judiciary is not criticism—it is commendation! But the judiciary is administered by mortals no less disposed to

those frailties supporting the division of governmental power than are those men who legislate and administrate.

The root of self-disciplinary procedures is fear of legislative impeachment powers. Judicial independence is the stated reason and public confidence is its slated governmental policy.

Irving Brant has recently chronicled the faults of Legislative Impeachment in his recent book "IMPEACHMENT—*Trials and Errors.*[10]

The State Constitutional structure, after incorporating the ethical standards of Canon 4, a squares with the impeachment and good behavior clauses of the Federal Constitution. Thus, it presents in justiciable context the historical debate concerning cause for impeachment. A debate which has repeated itself from 1797 [William Blount] through the recent abortive attempt on Mr. Justice Douglas.[11]

Canon 2 of the Canons of Judicial Ethics (ABA 1972) has been adopted since this case was docketed and provides: "a Judge should avoid impropriety and the appearance of impropriety in all his activities." This is the overbroad interpretation that the courts below have given to Canon 4. [Pet. App. 8-9.]

History proves that the vices of vagueness, overbreadth, *ex post facto* punishment and attainder inherent to political impeachments have been overcome by a division of accusatory and adjudicatory power.

The intrinsic problems cannot be removed. But what happens when the division of power is? Chief Justice John Marshall is unequalled as an advocate of the independence and supremacy of the judiciary. Marshall wrote Justice Samuel Chase during the impeachment of the latter:

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10. Alfred A. Knopf (New York, 1972).

11. See again: Brant, IMPEACHMENT—*Trials and Errors.*

> I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than (would) a removal of the judge who has rendered them unknowing of his fault.[12]

The narrow question is whether a judge misbehaves and may be removed from office for refusing to waive his federal privilege against self-incrimination. But in essence, this constitutional exercise here is the act that leads to appearance of impropriety as the offense requiring forfeiture. Thus, the Fifth Amendment question need not be reached if the appearance of impropriety standard is intrinsically antithetical to the presumption of innocence, the reasonable doubt standard and other rudimentary due process concepts.

If "the Constitution deals with substance, not shadows", with "the thing, not the name" [*Cummings* v. *Missouri*, 4 Wall 277, 325] apparent offenses are Constitutionally impermissible. They constitute metaphysical contradictions! They are the Constitution's antecedent reason. They are a fearsome throwback to the inherent evils of the Inquisitional standards designed to erase religious and political heretics.

Thus, the fact that conduct protected under the Self-Incrimination Clause constitutes the offense merely emphasizes the unconstitutionality of the standard applied.

Victims of circumstance are inconsonant with governments of law and prohibited under the Eighth and Fourteenth Amendments. [*Robinson* v. *California*, 370 U. S. 660.]

This case does not lack substance because it is episodic. It is substantial because it is. A substantial reason why this case should be heard is because it is not very likely to present itself again in justiciable form. Judges will thus be coerced into waiver of accusatory justice or will hastily

12. Marke, *Vignettes of Legal History* (Rothman & Co., 1965) *Impeachment of Samuel Chase*—page 294.

resign rather than suffer the fearsome consequences of a public demonstration of institutional purgation.

CONCLUSION.

Implicit throughout these proceedings is, that removal from office is not an aspect of criminality and not very painful. Yet, the conduct for which he was removed was established by the incriminating circumstances surrounding his appearance before a Grand Jury. And Section 4 of Article IV of the Illinois Constitution is more circumstantially involved than the Illinois immunity statute. Circumstances, by definition, cannot be self-controlled. Thus, if petitioner's immunity, protected him from prosecution, then the forfeiture of his office is defined by Section 4 of Article IV, *supra,* as a penalty that requires that "such officer forfeit his office after the presumption of his innocence is dispelled by conviction of an infamous crime in a trial court." [*People ex rel. Keenan* v. *McGuane,* 13 Ill. 2d 520, 537; 150 N. E. 2d 168.]

In a final attempt to empathize and prove the awfulness of the penalty inflicted, the petitioner in first-person respectfully says:

I pray this Court
Oh please be fair!

For I'm a felon
Who isn't there!

And I wasn't there
Again today!

Now, but for you,
I'm here to stay!

Respectfully submitted,

JOHN E. CASSIDY, JR.,
800 Lehmann Building,
Peoria, Illinois 61602,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

As counsel for the petitioner, I hereby certify that thi
petition for rehearing is presented in good faith and no
for delay and is restricted to clarification as involved i
cases such as *Heckman* v. *Taylor*, 327 U. S. 808, 392 U. S
495 and *Brinkerhoff-Faris Trust Co.* v. *Hill*, 280 U. S. s
550, 281 U. S. 673 and to other grounds specified in Rul
58(2).

JOHN E. CASSIDY, JR.,
Attorney for Petitione

APPENDIX.

ILLINOIS COURTS COMMISSION

IN THE MATTER OF RICHARD A. NAPOLITANO, JUDGE OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, *Respondent.*	M. R. 1324

ORDER.

This matter coming on to be heard on the pleadings filed in this cause, the evidence of witnesses produced, examined and heard in open Court, the exhibits identified and received in evidence, the arguments of counsel and the authorities and The Illinois Courts Commission being now fully advised in the premises on consideration thereof finds:

1. That this commission has been duly and properly convened;

2. That it has jurisdiction of the parties and the subject matter of this proceeding;

3. That the evidence in this case is clear and convincing that the conduct of Judge Richard A. Napolitano concerning certain concession contracts with The Illinois State Fair Agency while a member of the judiciary and the circumstances surrounding his testifying and the content of his testimony before the Sangamon County Grand Jury while a member of the judiciary, constitutes conduct unbecoming a Judge in that it violates applicable canons of judicial ethics including canon No. 4 of the Canons of Ethics adopted by the Illinois Judicial Conference and constitutes cause within the meaning of Section 18, Article 6 of the Illinois Constitution warranting his removal from office.

It is therefore ordered That Richard A. Napolitano be, and he is hereby removed from his office as a Judge of the Circuit Court (Cook County, Illinois) effective this date. Dated: July 14, 1970.

The Illinois Courts Commission.